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8 **UNITED STATES BANKRUPTCY COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SANTA ROSA DIVISION**

11 In re)	BANKRUPTCY CASE NO.
)	09-12469-RE-7
12 CAROLYN L. BURKE)	(Chapter 7)
)	
13 Debtor.)	
)	
14)	
)	
15)	
UMPQUA BANK, an Oregon state banking)	ADVERSARY CASE NO:
16 corporation,)	17-01035
)	
17 Plaintiff,)	UMPQUA BANK'S MEMORANDUM OF
)	POINTS AND AUTHORITIES IN
18 vs.)	SUPPORT OF MOTION FOR SUMMARY
)	JUDGMENT
19 CAROLYN L. BURKE,)	
)	
20 Defendant.)	Date: June 11, 2018
)	Time: 11:00
)	Ctrm: 99 South "E" Street
)	Santa Rosa, CA 95404

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22
23 **INTRODUCTION**

24 The origin of this adversary proceeding, as set forth in the amended complaint
25 recently filed, is that although debtor and defendant Carolyn Burke obtained a discharge in
26 her bankruptcy proceeding, property which she owned at the time of the bankruptcy filing
27 remained encumbered by a deed of trust in favor of plaintiff Umpqua Bank. The property
28 was recently sold and at the time Umpqua was entitled to payment of the amount secured

1 by its deed of trust in order for the lien of the deed of trust to be released at the time of the
2 sale; the amount owed Umpqua was \$231,077.27. As a result of a clerical error, the bank's
3 beneficiary demand submitted to escrow was for \$3,061.23. When the sale closed, Ms.
4 Burke received a windfall of \$227,936.69.

5 California law clearly allows the bank to recover this windfall to prevent Ms. Burke's
6 unjust enrichment. However, before proceeding, Umpqua seeks, by this action, a declaration
7 that pursuing litigation to recover the amount which was due it at the time of the sale closing
8 but not received does not violate the discharge injunction. As the following sets forth,
9 Umpqua is entitled to the judgment it seeks.

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11 I.

12 THIS DECLARATORY RELIEF ACTION IS THE METHOD
13 ALLOWED BY THE BAP TO DETERMINE WHETHER THERE
14 IS A POSSIBLE VIOLATION OF THE DISCHARGE INJUNCTION.

15 The Ninth Circuit Bankruptcy Appellate Panel ("BAP") has discussed in a number
16 of cases the right, and ability, of a creditor to obtain a post-discharge determination of
17 whether a planned action against the discharged debtor will run afoul of the discharge
18 injunction. The creditor is not put to the dilemma of having to determine whether to
19 abandon the claim against the debtor or risk facing a contempt citation if it proceeds.

20 In *In re Taggart*, 548 B.R. 275 (9th Cir. BAP 2016), the BAP confronted a situation
21 where a transfer of a limited liability company member interest had been made in violation
22 the operating agreement. After a discharge was entered, the LLC sued to set aside the
23 transfer and sought post-discharge fees. The debtor reopened the bankruptcy case to file a
24 motion for a determination of contempt. Ultimately, after an intervening appeal to the
25 district court, the bankruptcy court entered an order of contempt and entered a six figure
26 judgment awarding sanctions, including punitive damages.

27 On appeal, and after discussing the Ninth Circuit rules for determining contempt
28 based upon violation of the discharge injunction, the *Taggart* court determined the LLC's
lawsuit did not violate the discharge injunction. In making this determination, the BAP

1 noted as follows:

2 “We have previously said that a party seeking a bankruptcy court
3 determination regarding the scope of the discharge should file an adversary
4 complaint seeking declaratory relief. *See Ruvacalba v. Munoz (In re Munoz)*,
5 287 B.R. 546, 556 (9th Cir. BAP 2002).”

6 *Id.* at 289. Although, as noted by the court in note 12 (*ibid.*), a state court could determine
7 the scope of the discharge injunction, if the state court were wrong, the creditor would be
8 subject to contempt in the bankruptcy court¹.

9 In the case cited by the *Taggart* court, the BAP noted as follows:

10 “[D]eterminations regarding the scope of the discharge require a declaratory
11 judgment obtained in an adversary proceeding. Fed. R. Bankr.P. 7001(9); *Ung*
12 *v. Boni (In re Boni)*, 240 B.R. 381, 385-86 (9th Cir. BAP 1999). It is
13 long-settled that an action asking a court that is administering an injunction
14 whether it applies to proposed conduct is justiciable notwithstanding that the
15 ruling is advisory in nature. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15-16,
16 65 S.Ct. 478, 89 L.Ed. 661 (1945); *Hendrix v. Page (In re Hendrix)*, 986 F.2d
17 195, 200 (7th Cir.1993).”

18 *In re Munoz*, 287 B.R. 546, 551 (9th Cir. BAP 2002). In *Munoz* the BAP recharacterized
19 an improper bankruptcy court order denying modification of the discharge injunction as a
20 declaratory judgment, which the BAP then reversed as being contrary to the discharge
21 injunction. Stated more simply, the BAP determined, on the merits, that the declaratory
22 judgment entered by the bankruptcy court was substantively wrong.

23 Relying on this BAP precedent, Umpqua commenced this action to seek a substantive
24 determination of whether the discharge injunction prevents the bank from recovering the
25 improper windfall which Ms. Burke received. By this motion for summary judgment, the
26 bank seeks the judgment determining it may proceed with its proposed state court action.

27 ¹ The creditor in *Taggart* chose to seek a declaratory relief determination in the
28 state court, which the bankruptcy court had found a correct judgment. The BAP noted that the
creditor’s seeking of a declaratory judgment “should be praised, not sanctioned.”

II.

A STATE COURT ACTION TO RECOVER MS. BURKE'S
WINDFALL DOES NOT VIOLATE THE DISCHARGE
INJUNCTION IN HER BANKRUPTCY PROCEEDING

A. Statement of Facts

In December of 2007, Umpqua Bank made a loan to AWS, LLC. In conjunction with that loan, Ms. Burke, the principal of AWS, executed a guaranty in favor of the Bank. The guaranty was secured by a deed of trust on her property known as 401 San Lorenzo Court, Sonoma. (Declaration of Erika Gutierrez ("Gutierrez Declaration") filed concurrently herewith, p. 2, ¶¶4 and 5 and Exhs. A, B, and C.)

The AWS note went into default. Thereafter, Ms. Burke filed her bankruptcy proceeding and was granted a discharge. (The Court may take judicial notice of the discharge in its files.)

In 2017, First American sent a request for payoff to Umpqua Bank. As a result of not properly identifying the loan in its records, Umpqua's demand was for \$3,140.58. (Gutierrez Declaration, p. 3, ¶¶9 and 10, Exhs. D and E.)

However, this demand was in error. In fact, as of the date of the demand, the amount owing on Ms. Burke's guaranty was \$231,077.27. (Gutierrez Declaration, ¶12.) In spite of Umpqua notifying the escrow company and Ms. Burke of the error, Umpqua Bank has not received the amount it was entitled to receive on the sale of the 401 San Lorenzo property.

As set forth in the Amended Complaint on file in this matter, Umpqua seeks a declaration that its complaint against Ms. Burke for the windfall she received, and pursuing the complaint to judgment, will not violate the discharge injunction.

B. The Proposed Action against Ms. Burke Does Not Violate the Discharge Injunction.

Bankruptcy Code section 524(a)(2) provides that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor". The discharge only limits the available means of collecting on a claim - seeking to enforce the claim by a personal judgment on the claim; it does not operate as a satisfaction or exoneration of the claim. The

1 bankruptcy discharge extinguishes only "the personal liability of the debtor." *Johnson v. Home*
2 *State Bank*, 501 U.S. 78, 83 (1991) (holding that while the bankruptcy discharge extinguishes one
3 "mode of enforcing a claim—namely, an action against the debtor in personam," it leaves "intact
4 another—namely, an action against the debtor in rem").

5 As a result, where a creditor holds a claim secured by a lien perfected at the time of filing,
6 the discharge does nothing to impact the creditor's ability to collect the claim based upon its lien.
7 See also, *In re Fonseca* (*Fonseca v. Gov't Empls. Assn.*), 524 B.R. 628 (1st Cir. BAP 2015; *In re*
8 *Shook*, 278 B.R. 815, 820 (9th Cir. BAP 2002) ("We begin with the longstanding principle that a
9 secured creditor may bypass a debtor's bankruptcy proceedings and enforce its lien in the usual way,
10 because unchallenged liens pass through bankruptcy unaffected. See *Long v. Bullard*, 117 U.S. 617,
11 620–21, 6 S.Ct. 917, 29 L.Ed. 1004 (1886); *Dewsnup v. Timm*, 502 U.S. 410, 418, 112 S.Ct. 773,
12 116 L.Ed.2d 903 (1992). See also *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S.Ct. 2150,
13 115 L.Ed.2d 66 (1991) (bankruptcy extinguishes in personam claims against the debtor but generally
14 has no effect on in rem claims against the debtor's property).").

15 Umpqua clearly had the right to enforce its lien claim based upon its deed of trust securing
16 Ms. Burke's guaranty against the San Lorenzo Court property. At the time of the sale, that claim
17 was in the amount of \$231,077.27. However, Umpqua received only \$3,140.58. The balance of
18 \$227,936.69 was a windfall to Ms. Burke the she asserts she has the right to retain.

19 California law clearly gives Umpqua the right to collect the windfall from Ms. Burke. In
20 *Ghirardo v. Antonioli*, 14 Cal.4th 39 (1996), the California Supreme Court confronted a situation
21 similar to that here. The beneficiary of a purchase money deed of trust understated the amount
22 owing on the secured obligation and sought to recover the amount omitted from the payoff demand.
23 The Court first found that, like the situation here, there could be no action on the note. However,
24 the Court further concluded that the beneficiary could recover the amounts sought based upon
25 common law principles of unjust enrichment. *Id.*, 14 Cal.4th at 50. When the beneficiary
26 established the amount omitted, and the trustor failed to show any reasonable reliance on the error,
27 the beneficiary was entitled to recover based upon unjust enrichment.

28 Thus, Umpqua Bank has a common law claim based upon Ms. Burke's unjust enrichment

1 in obtaining and retaining amounts that were, in fact, owed to Umpqua Bank under its deed of trust.
2 This claim clearly was never discharged, because it arose only in 2017. The discharge injunction
3 has no application to the claim for unjust enrichment which Umpqua seeks to pursue.
4

5 CONCLUSION

6 Umpqua Bank has a claim against Ms. Burke for unjust enrichment which accrued well
7 after the discharge granted in her bankruptcy proceeding. The bank is entitled to a declaration that
8 pursuing that unjust enrichment claim will not violation the discharge injunction.
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11 DATED: May 8, 2018

FOX JOHNS LAZAR PEKIN & WEXLER, APC
A Professional Corporation

12
13 /s/ George C. Lazar

14 By: _____
George C. Lazar
15 Attorney for Umpqua Bank
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